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08-479

IN THE

Supreme Court of the United States

SAFFORD UNIFIED SCHOOL DISTRICT #1, *et al.*,
Petitioners,

—v.—

APRIL REDDING, legal guardian of minor child,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

BRUCE G. MACDONALD
MCNAMARA, GOLDSMITH,
JACKSON & MACDONALD, P.C.
1670 E. River Rd., Ste. 200
Tucson, AZ 85718
(520) 624-0126

ANDREW J. PETERSEN
HUMPHREY & PETERSEN, P.C.
3861 E. Third St.
Tucson, AZ 85716
(520) 795-1900

DANIEL JOSEPH POCHODA
ACLU OF ARIZONA
P.O. Box 17148
Phoenix, AZ 85011
(602) 773-6003

ADAM B. WOLF
Counsel of Record
GRAHAM A. BOYD
M. ALLEN HOPPER
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
1101 Pacific Ave., Ste. 333
Santa Cruz, CA 95060
(831) 471-9000

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

QUESTIONS PRESENTED

1. Whether it is reasonable to subject a thirteen year-old girl to the indignity of a strip search based on an unreliable accusation that she previously possessed ibuprofen and no information that she possessed ibuprofen in her undergarments at the time of the search.

2. Whether a school official should know not to order the traumatic strip search of a child based on an unreliable accusation that the child previously possessed ibuprofen and no information that she possessed ibuprofen in her undergarments at the time of the search.

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STATEMENT OF THE CASE

1. Thirteen-year-old Savana Redding was an eighth-grade student at Safford Middle School ("SMS") in the fall of 2003. J.A. 21a; Pet. App. 2a. An honors student, Savana had never been disciplined by the school. J.A. 21a.

Savana was in math class at SMS on October 8, 2003, when the school's Vice Principal, Kerry Wilson, entered her classroom. *Id.* Wilson asked Savana to pack her belongings in her backpack and follow him to his office. *Id.* He did not explain to Savana why he was removing her from class.

When they reached his office, Wilson admonished Savana about the importance of her telling him the truth. *Id.* Knowing she had nothing to worry about, Savana complied, affirming that she of course would be honest with Wilson. *Id.*

Savana then noticed that her planner was sitting open on Wilson's desk. *Id.* at 22a. But the items visible inside the planner, including knives, a lighter, and a cigarette, did not belong to her. *Id.* When asked about the planner, she honestly told Wilson that she had lent the planner several days ago to a fellow student named Marissa Glines and that the present contents of the planner were not her possessions. *Id.*

Wilson then pointed to four white pills and one blue pill, which were sitting atop his desk, *id.*, and which he by then knew to be 400 mg ibuprofen and the over-the-counter anti-inflammatory pill Naprosyn, *id.* at 12a, 13a. He asked Savana if she had seen these pills before, and she truthfully told

Wilson that she had not previously seen the pills. *Id.* at 22a. Savana also verified for Wilson that she had never brought any pills to school and had never given any pills to any Safford student. *Id.* at 23a. Savana's explanations neither seemed evasive nor otherwise aroused suspicion. *See also* Pet. App. 22a (noting that Petitioners had no basis for believing that Savana "was anything less than truthful" during her discussion with Wilson).

Wilson asked if he could search Savana's belongings, and Savana agreed. J.A. 23a. He and an administrative assistant, Helen Romero, searched Savana's backpack. *Id.* Consistent with Savana's assurances, they found nothing—no indicia of drug use, drug possession, or any other illegal or improper conduct. *Id.*

Having turned up no evidence to suggest any misconduct by Savana, Wilson nonetheless immediately ordered Romero to take Savana to the nurse's office. *Id.* Savana did not know why she was being marched into the nurse's office. As the door slammed and locked behind Savana, *id.* at 16a, the school nurse, Peggy Schwallier, was in the bathroom washing her hands, *id.* at 23a. At that point, Romero explained that they intended to search Savana for pills. *Id.* at 16a. The two school officials then directed Savana to undress. *Id.* at 23a. With both officials staring at Savana, she took off her pants and her shirt. *Id.* The officials did not notice any pills hidden in Savana's clothing, on her body, or under her panties or bra. *Id.* at 14a. Still, they told Savana to pull out her panties and bra and to move them to the side. *Id.* at 23a-24a. This order forced

Savana to expose her genital area and breasts to the school officials. *Id.* The observation of Savana's genital area and breasts, like the search of her backpack, failed to reveal any pills. *Id.* at 23a.

The school officials' viewing of Savana's naked body was "the most humiliating experience" of her life. *Id.* at 25a. Embarrassed and scared, Savana held her head down throughout the strip search "so that they could not see that I was about to cry." *Id.* at 24a. Throughout this ordeal, Savana was not permitted to call her mother. *Id.* at 25a. Following the incident, Savana, an honor-roll student at SMS, transferred to a different school. Pet. App. 137a.

2. Savana ended up naked and humiliated in front of her school officials due to an accusation provided that morning by Marissa. Acting on a tip by SMS student Jordan Romero that Marissa had just provided a pill to him on campus, Wilson went to Marissa's classroom. J.A. 12a.[1] As Wilson asked Marissa to leave the classroom with him, he noticed a planner in the desk next to her. *Id.* Marissa's teacher did not know who owned the planner, but when Wilson and Marissa walked by the classroom a short time later, the teacher showed Wilson that the planner contained various objects, including knives, a cigarette, and a lighter. *Id.* Wilson took the planner and its contents, and he escorted Marissa to his office. *Id.*

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[1] Jordan did not mention Savana's name that day, and he never indicated to Wilson—or any other school official—that Savana was involved in the possession or distribution of pills. Pet. App. 6a, 7a.

Wilson asked Marissa about her connection to the planner. *Id.* at 13a. She disclaimed any knowledge of the planner or its contents. *Id.* He then asked Marissa to open her wallet and empty her pockets, which she did, revealing a blue pill, several white pills, and a razor blade. *Id.* at 12a. The white pill was identical to the pill that Jordan claimed he received from Marissa. *Id.* Schwallier had previously advised Wilson that this white pill was 400 mg ibuprofen, a prescription-strength anti-inflammatory pill that has the strength of two over-the-counter Advil capsules. *Id.*; Pet. App. 2a, 8a.

When Wilson asked Marissa where she had gotten the blue pill, which Schwallier had identified as Naprosyn, Marissa replied that she had received the pills from Savana. J.A. 13a. Marissa did not provide any further information regarding the pills or Savana. She did not state, for example, when Savana allegedly provided her with the pills, where Savana allegedly gave her the pills, where Savana allegedly kept such pills (e.g., in her house, in her purse, in her locker, or on her person), or even whether Savana currently possessed any pills. *See* Pet. App. 8a. Nor did Wilson ask any such follow-up questions. *See id.* at 10a (noting that Wilson did not "question[] or investigat[e]" Marissa about her accusation concerning Savana).

Wilson then told Romero to escort Marissa to the nurse's office to search her clothing. J.A. 13a. Romero, aided by Schwallier, asked Marissa to remove her socks and shoes, raise up her shirt and pull out the band of her bra, take off her pants, and stretch the elastic on her underwear. *Id.* at 16a.

(Unlike their execution of the strip search of Savana, the school officials did not ask Marissa to take off her shirt. *Id.*) This search in the nurse's office did not yield any more pills in Marissa's possession. *Id.*

3. The path from Marissa's accusation to Savana's being strip searched was quick and direct. Even though Wilson already had isolated Savana in his office and thereby contained any possible danger to other students, he proceeded to strip search Savana without asking Marissa for any details about Savana's alleged misconduct and without seeking any information from Savana's mother or from other students or teachers.

Wilson sought to gather further facts regarding students' possible pill possession only *after* the examination of Savana's body and undergarments failed to yield any pills. *See* Pet. App. 9a-10a. For two-and-a-half hours following her strip search, Savana was forced to sit alone outside the Vice Principal's office. J.A. 24a. During that time she saw several individuals come through Wilson's office, including Jordan and another student, Chris Clark; a policeman; Marissa's father; and the Principal. *Id.* Savana learned that school officials searched Chris later that morning by asking him to empty his pockets and shake out his shirt and pants; they did not ask Chris to remove any of his clothing. *Id.* at 24a-25a. Petitioners searched Chris even though they subsequently acknowledged that "[n]o one ever identified [him] as possessing or distributing pills." *Id.* at 27a. The record is silent as to whether the school ever determined the real source of Marissa's pills, but what is clear is that the

school strip searched Savana first, based on Marissa's vague, uncorroborated, and unreliable accusation, and only later began asking questions.

Now in litigation, Petitioners further justify the disrobing of Savana through unrelated accusations that disparage Savana's character. For instance, they allege a disputed fact that Savana purportedly served alcohol at a pre-dance party held many months before the strip search.[2] *Compare id.* at 8a, *with id.* (recognizing that Savana's mother denied this allegation), and *id.* at 26a (Savana's stating that she did not serve alcohol to anyone prior to the school dance). They further claim that Savana was seen at this dance mingling with a group of girls, some of whom appeared intoxicated, even though the undisputed evidence in the record is that Savana did not drink alcohol before or during the dance. *Id.* at 7a, 26a. Finally, they note that Savana lent her planner to Marissa several days before the strip search, but they fail to mention the undisputed fact that Wilson knew at the time of Savana's strip search that the contents of the planner (including knives) were Marissa's, not Savana's. *Id.* at 22a. All of these contentions, including even the controverted facts, fail to link Savana to the pills. They concern disputed events that transpired, if at all, days or months before the strip search. Most importantly, they do not bolster suspicion that Savana was

[2] This case comes to this Court on Petitioners' motion for summary judgment. Accordingly, all disputed facts and all reasonable inferences drawn from the record must be resolved in favor of Respondent. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000).

concealing ibuprofen pills in her panties and bra at the time that Wilson ordered the strip search.

4. Savana was not permitted to call her mother before or during the search. *Id.* at 25a. When Savana told her mother about the strip search later that day, her mother was extremely upset. *Id.* Savana's mother demanded a meeting with the Principal, who told Savana and her mother that he "did not think the strip search was a big deal because they did not find anything." *Id.*

5. Through her mother, Savana filed a complaint against Petitioners, the school district and the school officials involved in the strip search, for violations of the Fourth Amendment and state law. Pet. App. 10a, 127a. A federal magistrate judge granted Petitioners' motion for summary judgment, and a three-judge panel of the court of appeals, over a vigorous dissent, affirmed. *Id.* at 10a-11a. Upon a vote of the majority of its active judges, the court of appeals ordered rehearing en banc. *Id.* at 12a.

Applying this Court's and lower-court precedent, the en banc court held that the strip search of Savana was unreasonable and violated the Fourth Amendment. *Id.* at 12a-33a. It concluded that Petitioners "acted contrary to all reason and common sense as they trampled over [Savana's] legitimate and substantial interests in privacy and security of her person." *Id.* at 16a.

The court held that the strip search of Savana was neither justified at its inception, *id.* at 18a-28a, nor reasonable in its scope, *id.* at 28a-33a. Strip searching Savana was not justified at its inception,

the court held, because Petitioners forced Savana to disrobe only upon the vague and uncorroborated accusation by an unreliable juvenile that Savana previously possessed ibuprofen. *See especially id.* at 21a-24a. Nor was the search reasonable in scope, as Petitioners looked under Savana's underwear and forced the exposure of her genital area and breasts when "no information pointed to the conclusion that the pills were hidden under her panties or bra (or that Savana's classmates would be willing to ingest pills previously stored in her underwear)." *Id.* at 29a.[3]

The court also concluded that "[t]he record . . . leaves no doubt that it would have been clear to a reasonable school official in Wilson's position that the strip search violated Savana's constitutional rights." *Id.* at 37a-38a. Accordingly, the court held that Wilson was not entitled to qualified immunity, even though qualified immunity was granted to the officials who merely followed Wilson's strip-search order. *Id.*

SUMMARY OF ARGUMENT

Children call their genitalia and breasts "private parts" for good reason. A child's "private parts" are not subject to observation by school

[3] Eight of the eleven judges on the en banc panel concluded that the strip search of Savana violated the Fourth Amendment. Pet. App. 1a-38a (majority opinion), 39a-41a (Gould, J., joined by Silverman, J., dissenting) (agreeing with majority that "our ruling should be crystal clear that schools may not subject a student to a strip search under circumstances as presented here").

officials without significant justification. One unreliable accusation that Savana possessed ibuprofen at some unspecified time in the past and in an unknown location did not provide sufficient reason to observe Savana's genital area and breasts. Petitioners' search inside Savana's undergarments clearly violated Savana's Fourth Amendment rights.

I. Respondent and Petitioners agree on the baseline protection offered by the Fourth Amendment: freedom from "unreasonable" searches. They also agree that school officials must "regulate their conduct according to the dictates of reason and common sense." *New Jersey v. T.L.O.*, 469 U.S. 325, 343 (1985). This case asks whether a school official, hearing an accusation that a thirteen-year-old girl provided ibuprofen to another student at some time in the past, exhibits reason and common sense when he jumps to the conclusion that this girl is currently storing ibuprofen inside her undergarments and then forces her to disrobe and expose her genital area and breasts to school officials.

A. A search by school officials is reasonable when it is both "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 341. Three federal circuit courts have held, and common sense suggests, that school officers must have a stronger factual basis to force a child to undress and submit her body for inspection than to search her backpack. If not, the strip search is not justified at its inception. Moreover, a school's search underneath a child's undergarments is reasonable in its scope only when school officials possess specific

information that leads them reasonably to believe that the object for which they are searching is in fact located against the child's genitalia or breasts.

B. It was unreasonable for Petitioners to have forced Savana to bare her genital area and breasts to her school officials. The information that school officials possessed would not have led a reasonable person to believe that Savana was concealing pills underneath her panties or bra. Petitioners executed the strip search after Marissa, caught with ibuprofen and Naprosyn, told Wilson she received the pills from Savana. Marissa did not say when she allegedly received pills from Savana or where Savana allegedly kept the pills. Based on this vague and uncorroborated accusation from an unreliable teenager who had been caught with pills in her possession, school officials subjected Savana to an invasive and traumatic strip search without conducting any further investigation until after the strip search was completed and produced nothing. On these facts, their actions were plainly unreasonable, and the decision to strip search Savana was unjustified at its inception.

The strip search of Savana was also unreasonable in its scope. Petitioners' scant evidence failed to provide any information that Savana was concealing ibuprofen in her panties or bra. After Petitioners searched Savana's backpack—the usual place students store their possessions—they forced Savana to push aside her undergarments in a manner that exposed the most private parts of her body. Without a grounded belief that they would find ibuprofen in Savana's

undergarments, Petitioners' search in that uniquely private location was unreasonable because it was based on nothing more than a mere hunch.

II. The strip search of Savana conflicted with established case law and violated both common sense and Savana's dignity. Accordingly, the court below properly denied qualified immunity to the school official who ordered this traumatic, unreasonable search.

At the time of the strip search of Savana, binding precedent from both the Ninth Circuit and the Arizona state courts dictated that a non-specific accusation of prior ibuprofen possession could not, by itself, justify a strip search. Even if Marissa's accusation were true, which it was not, Savana could have provided the ibuprofen pills earlier that week, month, or year; and there was no suggestion that Savana ever possessed ibuprofen against her genitalia or breasts. With such a paucity of information, a school official may reasonably have attempted to gather additional facts. However, a school official was on notice not to have ordered a traumatizing search of a thirteen-year-old girl's body on a mere hunch that the girl possessed ibuprofen at the time of the search and a baseless guess that the ibuprofen was being stored against her genitalia.

ARGUMENT

I. STUDENT STRIP SEARCHES INVADE SUBSTANTIAL AND REASONABLE EXPECTATIONS OF PRIVACY THAT ARE ENHANCED BY THE AGE OF THE CHILD AND UNDIMINISHED BY THE SCHOOL SETTING.

The strip search of Savana traumatized this adolescent girl. Petitioners not only removed Savana's clothes, they violated her dignity. When school officials strip search children, they invade privacy in a profound manner and risk lasting harm in ways that are categorically different from everyday searches of lunchboxes, backpacks, or lockers.

Fourth Amendment analyses typically commence with an assessment of the plaintiff's "legitimate expectation of privacy." *Hudson v. Palmer*, 468 U.S. 517, 525 (1984). In making that assessment, courts must consider to what extent a challenged search infringes "an expectation of privacy that society is prepared to consider reasonable." *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987). When a thirteen-year-old girl is forced to disrobe and bare her genital area and breasts to school officials, case law and academic research agree that her expectation of privacy is at its apex.

1. The law does not equate a person's relationship to her body with her relationship to her property. *See generally Wyoming v. Houghton*, 526 U.S. 295, 303 (1999) (distinguishing cases involving intrusions on "personal privacy" because the search

at issue involved the lesser intrusion of a search of belongings). Judicial opinions properly recognize that strip searches are an extreme intrusion and a unique personal violation. A limited search of one's possessions can be a significant privacy invasion. *See, e.g.*, *United States v. Place*, 462 U.S. 696, 708 (1983). As this Court has recognized, a search of a student's purse, even in a school, is "undoubtedly a severe violation of subjective expectations of privacy." *T.L.O.*, 469 U.S. at 337-38. But the privacy interest implicated by a search of a student's purse or locker is not comparable to the privacy invasion when school officials order the forced visual inspection of a teenage girl's naked body, breasts, and genital area.

Courts have consistently recognized the indignity and trauma caused by a strip search. "The experience of disrobing and exposing one's self for visual inspection [by an official]," the Tenth Circuit stated, "can only be seen as thoroughly degrading and frightening." *Chapman v. Nichols*, 989 F.2d 393, 396 (10th Cir. 1993). Courts around the country concur. *See, e.g.*, *Ciraolo v. City of New York*, 216 F.3d 236, 237, 238 (2d Cir. 2000) (calling a strip search "traumatiz[ing]," "humiliati[ng]," and "demeaning"); *Swain v. Spinney*, 117 F.3d 1, 6-7 (1st Cir. 1997) (citing opinions that deem strip searches "terrifying" and "dehumanizing"); *Cornfield ex rel. Lewis v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1321 (7th Cir. 1993) ("No one would seriously dispute that a nude search of a child is traumatic."); *Justice v. City of Peachtree City*, 961 F.2d 188, 192 (11th Cir. 1992) (recognizing strip searches to be

"thoroughly degrading and frightening"); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (describing a strip search as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission").

2. Petitioners do not deny that strip searches traumatize children. Instead, they discount the trauma they inflicted upon Savana by noting that the search could have been even more harrowing, and, in any event, the search was "[not] a big deal because they did not find anything [on Savana's person]." Pet. Br. 34; J.A. 25a. It is true that Petitioners could have inflicted even more trauma if, for instance, a male administrator had executed the search or if the school officials who conducted the search had touched Savana inappropriately in the process. Pet. Br. 34. (highlighting these two examples). But the fact that Petitioners could have ratcheted up the invasion of Savana's privacy to such shocking dimensions does not diminish the trauma, degradation, and thorough humiliation that occurs when a thirteen-year-old girl is ordered to undress, stand naked, and expose her genital area and breasts to her school officials. Pet. App. 31a ("[T]hat the student is viewed rather than touched, do[es] not diminish the trauma experienced by the child.") (internal citation omitted; second alteration in original) (citing academic study); *see also, e.g.*, *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982) ("[A] strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience.").

Social science literature bolsters judicial observations in concluding that a school official, in deciding to strip search a child, sets in motion a range of harms that include profound, enduring consequences. Children who are strip searched by school officials experience serious and often lasting emotional trauma. *See* Pet. App. 30a-31a (quoting, among other sources, Irwin A. Hyman & Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices that May Contribute to Student Misbehavior*, 36 J. Sch. Psychology 7, 13 (1998)); *see also, e.g.*, Scott A. Gartner, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve the Problem*, 70 So. Cal. L. Rev. 921, 928-31 (1997). For children, the immediate humiliation of a strip search often then translates into a more pervasive loss of self-esteem, resulting in lasting difficulties in their relationships with their families, peers, and educators. *See, e.g.*, Laura L. Finley, *Examining School Searches as Systemic Violence,* 14 Critical Criminology 117, 126 (2006). Adolescents who are strip searched in school experience, at the very least, deep feelings of stigma, shame, and worthlessness. *See, e.g.*, *id.* For many children, a strip search causes serious mental illnesses such as sleep disorders, recurrent recollections of the event, lack of concentration, anxiety, depression, phobic reactions, and suicide attempts. Pet. App. 31a (citing Stephen F. Shatz *et al.*, *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. Rev. 1, 12 (1991)). A child who is strip searched can experience trauma similar in kind and degree to the suffering of sexual-abuse victims. Doriane Lambelet Coleman,

Storming the Castle To Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment, 47 Wm. & Mary L. Rev. 413, 520-21 (2005); Gartner, 70 So. Cal. L. Rev. at 929. Because adolescence is "a time and condition of life when a person may be most susceptible to . . . psychological damage," *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982), it is hardly surprising that strip searches of adolescents are deeply traumatic events.

Savana was traumatized when she was locked in a room and forced to strip, exposing her genital area and breasts to school officials. Her legitimate expectation of privacy in her naked body was extraordinarily high.

II. THE STRIP SEARCH OF SAVANA WAS UNCONSTITUTIONAL BECAUSE PETITIONERS LACKED SUFFICIENT AND SPECIFIC SUSPICION TO FORCE HER TO EXPOSE HER GENITAL AREA AND BREASTS.

A strip search is a scarring, harrowing event for a thirteen-year-old girl. In order to lawfully impose this uniquely serious and demonstrably harmful privacy invasion, a school must have a significant and specific rationale to conduct such a search. As *amicus curiae* United States recognizes, Petitioners did not come close to clearing this hurdle on the record before this Court.

In schools, as elsewhere, searches violate the Fourth Amendment when they are "unreasonable." *T.L.O.*, 469 U.S. at 337; *see also Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v.*

Earls, 536 U.S. 822, 828 (2002). At its most general level, the reasonableness of a search is measured by "balancing the need to search against the invasion which the search entails." *T.L.O.*, 469 U.S. at 337 (quoting *Camara v. Mun. Court*, 387 U.S. 523, 536-37 (1967)). "On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order." *T.L.O.*, 469 U.S. at 337.

Petitioners urge this Court to dispense with any balancing of interests in favor of a bright-line, all-purpose rule that permits even the most invasive searches upon minimal and non-specific information. Their position defies the teaching of *T.L.O.* and conflicts with this Court's Fourth Amendment jurisprudence. Whatever the Fourth Amendment means, surely it requires a greater justification to peer inside the undergarments of a thirteen-year-old girl than to open her backpack.

The *T.L.O.* Court set forth a "twofold inquiry" to determine the reasonableness of a school search: First, in order to be reasonable, the search must be "justified at its inception"; second, a search must be "reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 341 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). "Under ordinary circumstances," the Court noted, a search will be justified at its inception "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* at 341-42. School

searches are generally permissible in their scope when they are "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* at 342.

T.L.O. concerned the search of a student's purse and its contents. Until now, this Court has not had occasion to apply the *T.L.O.* framework to a student strip search. Applying *T.L.O.*'s two-prong analysis in this context naturally leads to two conclusions: First, a strip search of a child is justified at its inception only when the school possesses a stronger factual basis to suspect wrongdoing than the bare minimum necessary to search a student's backpack or purse. By any definition, forcing a student to remove her clothes in front of school officials is a uniquely severe invasion of privacy. It therefore requires more than the non-specific, unreliable, and uncorroborated evidence of wrongdoing revealed by this record in order to be found reasonable under the Fourth Amendment. Three federal courts of appeals, including the court below, have applied *T.L.O.*'s first prong in this manner to strip searches.

Second, a school's search underneath a child's undergarments is lawful in its scope only when the school has specific information that a sought-after object is hidden in that intimate location. The court below acknowledged this second prong of *T.L.O.*, as applied to a strip search, and the federal government likewise advances this view.

Petitioners' strip search of Savana was unreasonable under both *T.L.O.* prongs. Marissa's

uncorroborated accusation did not indicate that Savana possessed ibuprofen at the time of the search. Moreover, the informant who pointed a finger at Savana was inherently unreliable: a juvenile who committed at least three crimes on campus that morning (distributing the pills at issue, possessing these pills, and bringing weapons onto campus) and who was just caught lying to Wilson (disclaiming any knowledge of the planner that, Wilson knew, was given to Marissa a few days earlier). Without conducting any further investigation into the source of the pills found in Marissa's possession, Petitioners had insufficient suspicion to strip search Savana.

In addition, Marissa's accusation was not sufficiently specific to permit the search of Savana's underwear and the observation of her genital area and breasts. Marissa's vague accusation claimed that Savana possessed ibuprofen at some time in the past and in some unknown location. Nothing in Marissa's uncorroborated accusation, even taken at face value, provided a basis for believing that Savana was concealing ibuprofen inside her panties and bra. Under any plausible Fourth Amendment standard, the strip search of Savana was unlawful.

A. The Fourth Amendment Requires Greater Suspicion of Wrongdoing For a Strip Search To Be Justified At Its Inception Than for the Search of a Student's Backpack.

The *T.L.O.* framework, the rationale behind that opinion, and common sense demand that the

relatively minimal governmental interest that justifies searching a backpack will not suffice to strip a child of her clothing. After all, when a significant weight is placed on one side of the scale—a student's legitimate expectation of privacy in her body—an equal or greater weight must balance on the other side—the school's need to conduct the search—in order for the search to be reasonable.[3]

T.L.O. provides that, "under ordinary circumstances," a school search is justified at its inception when the school possesses reasonable suspicion of wrongdoing. 469 U.S. at 341-42. However, forcing a child to stand naked for observation by her school officials is an extraordinary, not an ordinary, circumstance. Mindful that "reasonableness" is the touchstone of the Fourth Amendment, *id.* at 337, the minimal suspicion to conduct the ordinary search of a backpack is not sufficient to command that a child take off her clothing for school officials to observe her body.

The logic behind *T.L.O.* points in the same direction. *T.L.O.*'s instruction that a child's expectation of privacy must be balanced against the governmental need to conduct a search, *id.*, means that there will be occasions when a school has legally sufficient suspicion to search in locations where a child has a lower expectation of privacy but not in an intimate place where her expectation of privacy is far

[3] Respondent's framework does not propose a sliding scale for all searches but rather recognizes that a student strip search is uniquely invasive. School officials must therefore have a stronger factual basis to suspect wrongdoing before ordering a child to remove her clothing.

greater. One side of the Fourth Amendment balance—the child's expectation of privacy—shifts drastically depending on whether the school conducts a mine-run search or a uniquely invasive strip search, since a child has radically different expectations of privacy in her backpack and under her panties.[4]

Recognizing this basic tenet of a balancing test and interpreting *T.L.O.*, the Second, Seventh, and Ninth Circuits have set forth what should be obvious: "as the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness." *Cornfield*, 991 F.2d at 1321; *Phaneuf v. Fraikin,*, 448 F.3d 591, 596 (2d Cir.

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[4] Overlooking the language and logic of *T.L.O.*, the federal government contends that the quantity or quality of evidence needed to search a backpack is no different from that needed to search inside a child's undergarments. To the extent that the government believes that a school may strip search a child based on scarcely plausible evidence, so long as that evidence is location-specific, its position is both erroneous and likely to lead to unjustified strip searches. For instance, assuming *arguendo* that a school could lawfully search the backpack of a student based on a tip from a fellow student with a history of lying and a personal grudge—on the theory that the tip is particularized and provides more than a "hunch" of wrongdoing, *T.L.O.*, 469 U.S. at 346—surely a school may not force the exposure of a child's genitalia based on such dubious evidence, just because the accuser claimed that contraband would be found in the accused student's underwear. *See, e.g.*, *Fewless ex rel. Fewless v. Bd. of Educ. of Wayland Union Sch.*, 208 F. Supp. 2d 806, 816-17 (W.D. Mich. 2002) (holding unlawful a student strip search based on a tip that the student possessed marijuana in his "butt crack," when that tip was apparently motivated by a fellow student's grudge).

2006) ("[T]he reasonableness of the suspicion is informed by the very intrusive nature of a strip search, requiring for its justification a high level of suspicion.") (internal citation omitted); *id.* at 597 ("[A]s the intrusiveness of the search intensifies, the standard of Fourth Amendment 'reasonableness' approaches probable cause, even in the school context.") (quoting *M.M. v. Anker*, 607 F.2d 588, 589 (2d Cir. 1979) (per curiam)); Pet. App. 18a-19a.

A treatise that provides guidance to school officials, published by the National School Board Association, states this clearly:

> Despite the fact that probable cause is not required in searches by school personnel, the degree of reasonable suspicion necessary to conduct a search does vary with the degree of intrusiveness of the search. . . . Therefore, the standard of Fourth Amendment reasonableness needed to search a locker or a pocketbook may fall short of reasonableness for a strip search.

Ann L. Majestic et al., *Legal and Policy Issues in Curbing Violence in Schools*, *in* Jonathan A. Blumberg et al., Legal Guidelines for Curbing School Violence 2 (National School Board Association Council of School Attorneys 1995). This approach—requiring a lower level of suspicion for mine-run school searches and a relatively higher level of suspicion for seriously invasive searches—is inherent in a balancing test that assesses overall "reasonableness." Virtually every authority on

school law agrees that a strip search requires more than the ordinary level of suspicion for school searches.[5]

Petitioners nonetheless chide this well-accepted approach, labeling it a hopelessly complicated sliding scale, claiming that school searches need not be supported by probable cause, and contending that school officials are ill-equipped to balance legitimate expectations of privacy against suspicion that an object is hidden in a child's underpants or bra. Pet. Br. 28-31. Though school officials need not be hamstrung by the probable-cause standard, *T.L.O.*, 469 U.S. at 341 ("[T]he accommodation of the privacy interests of schoolchildren with the substantial need of

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[5] *See, e.g.*, Nathan L. Essex, School Law & The Public Schools: A Practical Guide for Educational Leaders 42 (2d Ed. 1999) ("[W]hen a teacher conducts a highly intrusive invasion, such as a strip search, it is reasonable to approach the probable cause requirement."); John S. Aldridge & John A. Wooley, Legal Guidelines for Permissible Student Searches in the Public Schools 19 (1990) (citing *T.L.O.* and noting that strip searches "generally would require a standard approaching the criminal probable cause requirement"). *Cf.* David C. Blickenstaff, *Strip Searches of Public School Students: Can* New Jersey v. T.L.O. *Solve the Problem?*, 99 Dick. L. Rev. 1, 47-48 (1994) (noting that the suspicion necessary to justify a strip search must be greater than the suspicion to conduct other, less invasive searches); Jacqueline A. Stefkovich, *Strip Searching After Williams: Reactions to the Concern for School Safety?*, 93 Ed. L. Rep. 1107, 1110 (1994) (same); Charles W. Avery & Robert J. Simpson, *Search and Seizure: A Risk Assessment Model for Public School Officials*, 16 J.L. & Educ. 403, 409 n. 28 (1987) (same); Larry Bartlett, New Jersey v. T.L.O.*: Not an End to School Search Litigation or Commentaries*, 23 Ed. L. Rep. 801, 807 (1985) (same).

teachers . . . to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause . . . ."), *T.L.O.* provides that, in exchange for authority to conduct searches without clearing the probable-cause hurdle, school authorities must balance governmental interests and privacy intrusions, *id.* at 337. With the privilege of flexibility comes the responsibility to reasonably calibrate the school's interests and children's privacy. Respondent does not argue that Petitioners must have had probable cause to have forced her to disrobe, but she does maintain, consistent with *T.L.O.*, lower courts interpreting *T.L.O.*, and a common sense of human dignity, that school officials were required to have greater suspicion of wrongdoing to strip search her than to search her backpack.

The distinction between strip searches and other searches is clear and simple. Furthermore, this two-tiered framework balances the unique environment of schools with the recognition that strip searches and mine-run school searches occupy entirely different categories of privacy invasion. Finally, school officials can easily understand and administer the principle that a vague, unreliable, and uncorroborated accusation by another student who is already in trouble cannot justify a strip search.[6]

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[6] This Court has recognized that "reasonable suspicion" is not susceptible of precise definition, *see Ornelas v. United States*, 517 U.S. 690, 695 (1996), but that does not mean it lacks enforceable standards. Petitioners' assertion that the reasonableness of a strip search is entirely divorced from the

Forcing a teenager to strip in front of school officials and to bare her naked body to them seriously violates a young girl's dignity and privacy. Because such searches intrude so heavily upon a legitimate expectation of privacy, the Fourth Amendment requires school officials to have stronger evidence before moving from the search of a student's backpack to a strip search.

B. The Fourth Amendment Requires Suspicion That An Object Is Currently Hidden Beneath Undergarments For a Search Of Those Undergarments To Be Reasonable In Its Scope.

As *amicus curiae*, the United States notes that school officials could have forced Savana to disrobe and bare her genital area and breasts only if they reasonably suspected that a search of her panties and bra would have yielded ibuprofen pills. Br. of *Amicus Curiae* United States 13-17. That much is axiomatic: school officials may search in only those places where they reasonably believe that a sought-after object may be found. This proposition, likewise recognized by the court below, is grounded in *T.L.O.*, blackletter Fourth Amendment jurisprudence, and common sense.

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invasiveness of a strip search defies logic and common sense. If that were true, then *Terry* frisks would not be limited to pat-down searches. Likewise, under Petitioners' argument, government employers could strip search their employees upon the minimal suspicion of wrongdoing needed to search inside employees' desks. *See O'Connor*, 480 U.S. at 724-25.

This Court stated in *T.L.O.* that "the search" may be reasonable where there are "reasonable grounds for suspecting that [it] will turn up evidence . . . ." 469 U.S. at 342. In a similar vein, *T.L.O.* provides that the scope of a search must be limited by its "objectives," *id.*—in this case, to find pills. A search for pills, according to *T.L.O.*, would be plainly unreasonable in scope when a school official has insufficient suspicion to believe that pills would be found in the searched location. *See also* Pet. App. 29a (noting that a strip search is unreasonable in scope when "no information point[s] to the conclusion that the [sought-after objects] were hidden under [a child's underwear]").

The *T.L.O.* Court's limitation on the location of a search is rooted in basic Fourth Amendment doctrine. In order for a search to comply with the Fourth Amendment, the searching official must have the requisite quantum of suspicion "that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *see also, e.g.*, *United States v. Grubbs*, 547 U.S. 90, 95, 97 (2006); *United States v. Ross*, 456 U.S. 798, 824 (1982) (noting that the lawful scope of a search is confined to the places where an officer reasonably believes the sought-after object will be found). This admonition takes on heightened importance when a person, and not a car or building, is searched. *Houghton*, 526 U.S. at 303. Though the quantum of suspicion varies depending on the context—probable cause in most circumstances and less suspicion in some others—a bedrock demand of the Fourth Amendment is that the searching officer has a

sufficient belief that the place he searches contains the sought-after object.

Petitioners, however, dangerously elide the need for suspicion that an object will be found in the searched location. *See, e.g.*, Pet. Br. i (framing the alleged question presented as whether "a search"—any search—was justified on the record before this Court, whereas Savana's legal claim concerns her strip search and not the search of her bookbag). They apparently believe that when a school official receives a vague, non-specific accusation that a child formerly possessed an ibuprofen pill in some unknown location, the official is presented a blank check to search anywhere and everywhere—from the child's bag to her body to her body cavities. Under Petitioners' logic, there is no stopping point; without any requirement that the school official have reason to believe that a pill is located in the place he searches, the official could order an anal probe, for example, of a child whenever he is provided information that the child previously possessed the pill.

The Fourth Amendment does not countenance such casual disregard for a thirteen-year-old girl's reasonable expectation of privacy in her most intimate body parts. Rather, consistent with *T.L.O.*, myriad other Fourth Amendment cases, and common sense, searches may be reasonable only when the official "reasonably suspect[s] not only that the student possesses contraband but also that it is hidden in a place that such a search will reveal." Br. of *Amicus Curiae* United States 17; *see also* Pet. App. 29a.

C. The Strip Search of Savana Was Unreasonable Both At Its Inception and In Its Scope.

Petitioners' strip search of Savana fails both *T.L.O.* prongs. First, Petitioners did not possess at the time of the strip search sufficient suspicion that Savana was currently engaged in wrongdoing. The school's exclusive justification for the search was an uncorroborated accusation from an unreliable juvenile that Savana previously possessed ibuprofen. The accusation provided minimal, if any, suspicion of current wrongdoing, and, in any event, the common junior-high-school occurrence of tattling on a fellow student, without more, hardly provides sufficient suspicion to execute such an invasive search. Second, Marissa's non-specific accusation did not provide Petitioners with reasonable suspicion that Savana possessed ibuprofen in her panties and bra at the time of the search. Rather, the accusation was remarkably vague in both temporal and spatial detail, as it neither claimed that Savana possessed ibuprofen at the time of the search nor stated that Savana ever concealed ibuprofen in her underwear.

T.L.O.'s two-prong standard is meant to guide an inquiry into the overall "reasonableness" of a school search, so it is no coincidence that an application of the *T.L.O.* framework to the facts of this case yields a common-sense conclusion: Savana should not have had to bare her genital area and breasts to her school officials solely on the vague say-so of another student. Under *T.L.O.* and any conception of reasonableness and dignity, the strip search of Savana was unreasonable.

1. The Strip Search of Savana Was Not Justified at its Inception.

As noted above, school officials should not be permitted to strip search a child with no more suspicion than they need to search her backpack. In this case, however, Petitioners strip searched Savana with remarkably little suspicion that she possessed pills at the time of the search.

Whether government officials possess sufficient suspicion for a search depends on "the content of information possessed by [officials] and its degree of reliability." *Alabama v. White*, 496 U.S. 325, 330 (1990). Here, the content of the information known to Petitioners at the time of the search was minimal, since Marissa did not state or even imply that Savana presently possessed ibuprofen; and its reliability was dubious, in light of Marissa's many transgressions and history of lying to school officials. Because Petitioners did not conduct any investigation after receiving Marissa's vague, unreliable accusation and before strip searching Savana, their suspicion that Savana was presently engaged in wrongdoing does not approach the suspicion necessary to justify a strip search.

a. Conspicuously absent from Marissa's accusation was any statement that Savana possessed ibuprofen when she was searched. Marissa falsely stated that Savana gave her the ibuprofen and Naprosyn pills, but she did not claim that Savana provided the pills that day, or even that week or month. J.A. 13a; *compare* J.A. 11a (providing that Jordan told the school's vice principal that Marissa "had just given him the pill"). She did not claim that

Savana gave the pills to her on school grounds. J.A. 13a; *compare* J.A. 11a (providing that Jordan told the school's vice principal that Marissa gave pills to him on campus). She did not claim that Savana had provided or was scheming to provide such pills to anyone else. And, perhaps most importantly, she did not claim that Savana currently possessed ibuprofen or Naprosyn. Marissa's accusation hardly provided sufficient suspicion that Savana was engaged in wrongdoing at the time of the search.

b. The vague content of Marissa's accusation did not provide Petitioners with the requisite suspicion to strip search Savana, even if the accuser, Marissa, were reliable. As it turns out, however, just as the "content of information" was lacking, so too was Marissa's reliability.

Marissa was a teenager caught red-handed with pills in violation of school policy. She did what many teenagers would have done in that situation: divert attention to someone else. The fact that Marissa accused someone of being more blameworthy than herself—she alleged that Savana was the distributor of the ibuprofen—does not foreclose the possibility that Marissa provided truthful information, but it certainly casts a pall over her credibility.

This Court has "consistently . . . viewed an accomplice's statements that shift or spread the blame to a criminal defendant as falling outside the realm of [trustworthy statements]." *Lilly v. Virginia*, 527 U.S. 116, 133 (1999), *cited in* Pet. App. 22a; *see also, e.g.*, *United States v. Hall*, 113 F.3d 157, 159 (9th Cir. 1997) ("Once a person believes that the

police have sufficient evidence [against him], his statement that another person is more important . . . than he gains little credibility . . . ."). The court below cited *Lilly* and then assessed Marissa's reliability:

> Our concerns are heightened when the informant is a frightened eighth grader caught red-handed by a principal. This is particularly so when the student implicates another who has not previously been tied to the contraband . . . . More succinctly, the self-serving statement of a cornered teenager facing significant punishment does not meet the heavy burden necessary to justify a search accurately described by the Seventh Circuit as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant [and] embarrassing."

Pet. App. 23a (quoting *Mary Beth G.*, 723 F.2d at 1272).

Petitioners do not directly rebut this, but instead focus on (1) their belief that Jordan—not Marissa—was reliable, (2) their assertion that Marissa would be concerned about facing retribution had she provided a false accusation, (3) their assumption that Marissa was not offered leniency in exchange for her accusation, and (4) Marissa's alleged friendship with Savana. Many of these contentions are not in the record, are untrue, and, in any event, merely distract from the overarching concerns about Marissa's reliability: she "offered up"

Savana to divert attention from herself after she had been caught lying to the Assistant Principal and was in trouble for having committed three criminal acts on campus that morning.

First, Jordan's reliability has no bearing on Marissa's reliability. Jordan never linked Savana to pills; only Marissa purported to do so. Moreover, far from bolstering Marissa's credibility, Jordan informed school officials that Marissa engaged in the unlawful conduct of distributing prescription pills on school grounds.

Second, Marissa could not have been concerned about facing additional punishment when the search of Savana produced no evidence because Marissa's accusation was so non-specific—that Savana provided the pills to her at some point in the past—that the school's failure to uncover ibuprofen after searching Savana would not have exposed Marissa to punishment for lying. This is far different from the case that Petitioners cite in support, *C.B. ex rel. Breeding v. Driscoll*, 82 F.3d 383, 388 (11th Cir. 1996), *see* Pet. Br. 26, where the Eleventh Circuit understandably noted that the student informant in that case might be deemed more reliable because he could have been disciplined had his tip proved incorrect. In *C.B.*, the informant told a school official that C.B. was planning on selling drugs that day and that C.B. was currently concealing drugs under his large jacket. 82 F.3d at 385. Unlike in the present case, where a fruitless search would not have disproved the accusation provided to Wilson, a fruitless search of C.B. would have suggested that the informant in that case had lied.

Third, Petitioners' contention that Marissa was not provided leniency overlooks the dynamic of schoolhouse accusers, is unsupported by the record, and may actually be incorrect. Unlike interactions between criminal suspects and law-enforcement officers, students do not generally plea bargain with school officials in exchange for truthful information. *See* Pet. Br. 30 ("Nor are school officials in the practice or habit of cutting deals with students in which leniency is exchanged for information that allows officials to pursue other students . . . ."). Rather, they hope that the school officials' attention is diverted to someone else, which in fact occurred here. Upon Marissa's accusing Savana, school officials cut short their questioning of Marissa and escorted her from Wilson's office so that Wilson could retrieve Savana from her class. J.A. 13a. Marissa was then searched less invasively than Savana. J.A. 16a (noting that Petitioners forced Savana, but not Marissa, to take off her shirt).

Finally, Petitioners go to great lengths to attack Savana and to note that Savana had shared things, but not pills or other drugs, with Marissa in the past, suggesting a friendship between the two. This contention, however, is neither true nor particularly relevant to Marissa's reliability. Had Wilson questioned either Savana or Marissa about their relationship, he would have learned that they were no longer friends. That aside, Wilson was aware of key pieces of evidence that should have dismantled his belief in the reliability of Marissa's accusation: Marissa had been caught committing three illegal acts that day (distributing pills,

possessing pills, and bringing weapons to school), and Marissa already had lied to Wilson that morning (when she disclaimed any knowledge of the planner found next to her in class). *Compare* J.A. 13a (Wilson's acknowledging that Marissa "denied knowing anything about [the planner and its contents]"), *with* J.A. 14a (Wilson's acknowledging that Savana told him that she lent the planner, but not its contents, to Marissa days earlier). Just as an informant's tip is often considered more reliable once the informant is believed to have provided truthful information in the past, *see, e.g.*, *Gates*, 462 U.S. at 244, an informant's reliability is dubious once she is suspected of outright lying to the government official just before providing her tip.

On the spectrum of informant reliability, Marissa is well below average. She was a teenager in trouble, who was attempting to divert the Vice Principal's attention away from herself, who was caught committing three separate criminal acts that morning, and who was just revealed as a liar to this school official. Combining Marissa's unreliability with the dearth of information that Savana was concealing ibuprofen at the time of the search, Petitioners lacked the requisite suspicion to strip search Savana.

c. After receiving a vague accusation from an unreliable informant, Petitioners' failure to conduct any additional investigation before strip searching Savana ensured that they would not possess sufficient suspicion of her wrongdoing. Although further investigation potentially could have yielded facts providing Petitioners with sufficient suspicion

of wrongdoing, the officials unreasonably jumped to a strip search of Savana and asked questions only later.

The lower courts have recognized the necessity for school officials to conduct further investigation before strip searching children based solely on juvenile-informants' tips. There are relatively few cases where courts have upheld the constitutionality of strip searches based initially on informants' tips, and in virtually all of them the courts noted the importance of the school officials' having corroborated the tips prior to executing the invasive searches. In *Cornfield*, for example, the Seventh Circuit upheld a strip search of a student where school officials were initially tipped off about the plaintiff's current drug possession by a student-informant, but, prior to strip searching him, the officials corroborated the tip by first noticing an "unusual bulge in [the student's] crotch area" and then discovering a police report finding that the student had a history of "crotch[ing] drugs."[7] 991 F.2d at 1322. Similarly, in *Williams ex rel. Williams v. Ellington*, 936 F.2d 881, 882-83 (6th Cir. 1991), the Sixth Circuit held that a strip search of a student was reasonable where school officials acted on a student-informant's tip of current drug possession only after corroborating the tip by finding a note that

[7] Still, the court of appeals found it relevant that the school officials did not force that student to "suffer the indignity of standing naked before them but allowed him to put on a gym uniform while they searched his street clothes." 991 F.2d at 1323. Petitioners did not accord the same respect and dignity to Savana. J.A. 23a-24a.

the student wrote acknowledging her own drug use and by calling the student's father, who confirmed that the student was a habitual drug user. *See also, e.g.*, *Tarter v. Raybuck*, 742 F.2d 977, 979, 980 n.2, 983 (6th Cir. 1984) (upholding strip search of student when school officials corroborated a student-informant's tip of drug possession by personally witnessing the student's engaging in a drug transaction, smelling marijuana on the student's breath, and discovering that the student had a history of smuggling marijuana in his underwear). *Cf. C.B.*, 82 F.3d at 388 (holding that a school search of a student's pocket was reasonable, in part, because the informant's detailed tip that led to the search "received . . . corroboration" by the school officials).

On the other hand, numerous courts have held that strip searches in schools are unconstitutional when they are based on uncorroborated informant tips. The court below joined the Second, Sixth, and Seventh Circuits, in addition to a prior panel of the Ninth Circuit, in holding that strip searches should not be founded solely on an uncorroborated juvenile-informant's allegation. In *Phaneuf*, the Second Circuit held that a strip search of a child was unreasonable, despite a specific tip from a known student that the plaintiff was hiding drugs in her pants, because the school official did not substantiate the tip before ordering the strip search. 448 F.3d at 598-99. The *Phaneuf* court was deeply troubled by the school official's "acceptance of one student's accusatory statement to initiate a highly intrusive search of another student—with no meaningful inquiry or corroboration." *Id* at 598; *see also*

Williams, 936 F.2d at 888-89 ("We can correlate the allegations of a student, implicating a fellow student in unlawful activity, to the case of an informant's tip. While there is concern that students will . . . falsely implicate other students in wrongdoing, . . . school officials would be required to further investigate the matter before [conducting a strip search]."); *Bilbrey ex rel. Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir. 1984) (holding that school official who conducted strip search on the basis of an uncorroborated tip of current drug possession is not entitled to qualified immunity); *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980) (same). The case law reflects an important practical understanding: juveniles sometimes act in a juvenile manner—malicious or just reckless to divert attention, they often falsely implicate their peers. Only by corroborating a juvenile-informant's tip prior to employing it to conduct a strip search can school officials ensure that strip searches are not as common as the frequent occurrence of student tattling.

Casting aside common sense and case law, Wilson failed to conduct any investigation before using Marissa's accusation to strip search Savana. Wilson talked with others about the pill situation, but he did so only *after* ordering the fruitless strip search of Savana. *See supra* pp. 5-6. Prior to ordering a strip search of Savana, Wilson did not speak with Savana's mother, any of Savana's teachers, or anyone else to shed light on suspicion of Savana's drug use or possession. *Compare, e.g.*, *Williams*, 936 F.2d at 887 (noting that a school official who received a tip of a student's drug

possession subsequently confirmed the student's drug use, including drug use during school hours, by conversing with the student's father and teacher). Perhaps most importantly, Wilson did not question Marissa to ascertain necessary details: when—today, yesterday, last week—did Savana allegedly provide the pills to Marissa, was Savana still in possession of ibuprofen (or any other pill or drug); and where—in Savana's house, locker, purse, backpack, lunchbox, pencil case, or panties—had she seen Savana possess pills?

Most school officials would have taken all of these investigatory steps. At the very least, any reasonable school official would have pressed Marissa for these obviously crucial details concerning Savana's alleged pill possession prior to ordering the removal of her clothing. *Cf.* Pet. App. 23a-24a ("This need for further investigation is particularly heightened here because the initial tip provided no information as to whether Savana currently possessed ibuprofen pills . . . .").

Petitioners do not contest the importance of corroborating juveniles' tips, but instead claim, contrary to the record, that Wilson did in fact corroborate Marissa's accusation. As ostensible support, they highlight Savana's alleged serving of alcohol months before the strip search and the fact that Marissa placed contraband in the planner that Savana had lent her. Pet. Br. 14-15. However, Savana's purported alcohol serving is disputed, *see* J.A. 26a—and therefore must be discounted entirely, *see Reeves*, 530 U.S. at 150-51—and Marissa's bringing weapons and a cigarette onto school

grounds hardly bolsters her reliability. More importantly, these alleged facts simply do not corroborate the accusation that Savana possessed pills. *See supra* pp. 6-7.

Finally, Petitioners point out that Wilson followed up with Marissa about the items found in the planner. Pet. Br. 25. However, Wilson's asking about the contents of the planner, which did not contain pills, does not bear on whether Wilson inquired about the accusation concerning Savana's alleged possession of pills. Although Wilson could have attempted to shed light on Marissa's vague accusation of Savana's prior pill possession, he did not do so before ordering the strip search of Savana. *See generally* Pet. App. 9a-10a ("[O]n the sole basis of Marissa's attempt to shift the school officials' focus . . . *and without additional questioning or investigation*, Wilson directed his assistant and the school nurse to require a thirteen-year-old to disrobe.") (emphasis added).

Without further investigation—armed with merely a vague accusation from an unreliable juvenile—Petitioners had an insufficient basis for their suspicion of Savana's wrongdoing for a strip search of Savana to have been justified at its inception.

2. *The Strip Search of Savana Was Unreasonable In Its Scope.*

The strip search of Savana was also unreasonable in its scope because Petitioners demanded to search beneath Savana's panties and bra without any specific suspicion that she was

concealing ibuprofen in these intimate locations. As *amicus curiae* United States correctly notes, even if Marissa were an entirely reliable source of information, her accusation was so lacking in spatial and temporal detail that Petitioners could not have reasonably concluded that a search of Savana's panties and bra would turn up ibuprofen. Br. of *Amicus Curiae* United States 20-22.

Marissa's accusation lacked any temporal detail: it did not provide suspicion that Savana possessed ibuprofen or Naprosyn at the time of the search. *See supra* pp. 29-30. The accusation was equally lacking in spatial detail. Marissa did not claim that Savana was hiding ibuprofen or Naprosyn in her panties or bra. She did not claim that Savana ever stored pills against her genitalia. And she did not claim that she or anyone else at the school stored against their genitalia pills that they would later put in their mouths. Marissa's vague accusation did not provide Petitioners with specific suspicion that their search of Savana's panties and bra would yield ibuprofen pills.

This is not to say that students could never conceal pills against their genitalia. However, Marissa's non-specific accusation did not indicate that Savana, an honors student with a clean disciplinary record who had not previously been suspected of storing pills in her crotch (or anywhere else), was concealing pills in her undergarments at the time of the search. *Cf.* Br. of *Amicus Curiae* United States 21 (stating that Wilson reasonably could have searched only Savana's backpack, since

that is "'the obvious place' to find [pills]") (referencing *T.L.O.*, 469 U.S. at 346).

The other potentially relevant information known to Petitioners likewise did not point to Savana's possessing pills in her undergarments:

- Before he ordered the strip search of Savana, Wilson surely was aware that the strip search of Marissa did not uncover any more pills. Perhaps finding other students smuggling pills in their underpants or bras would have heightened Wilson's suspicion that the strip search of Savana would yield contraband. But Marissa was found with pills in her pockets, not against her genitalia or breasts.
- Savana was neither evasive nor obstructive in response to Wilson's questioning or searching her backpack. Her demeanor did not arouse any suspicion.
- The search of Savana's backpack turned up no contraband or other items that could have contributed to suspicion that a strip search would yield evidence of wrongdoing.[8]

All of these pieces of information either (1) did not buttress suspicion that a strip search of Savana would yield pills or (2) affirmatively diminished the suspicion that Savana possessed pills in her panties

[8] It is conceivable that other information might have provided sufficient suspicion that Savana was concealing ibuprofen that day in her undergarments. Wilson did not have any other information, however, and he decided not to attempt any further investigation of the situation before ordering the strip search. *See supra* pp. 5-6, 37-38.

and bra. *See also* Pet. App. 29a (holding that the strip search of Savana was unreasonable in its scope because "the most logical places where the pills might have been found had already been searched to no avail, and no information pointed to the conclusion that the pills were hidden under her panties or bra (or that Savana's classmates would be willing to ingest pills previously stored in her underwear)").

This case, therefore, stands in marked contrast to *T.L.O.* There, the vice principal reasonably suspected that T.L.O. violated a school policy prohibiting the smoking of cigarettes in a school bathroom after a teacher reported to him that she had just walked into the bathroom and plainly witnessed T.L.O. and another student smoking. 469 U.S. at 345-46. This tip was clear, specific, and from a faculty member, which warranted the principal's searching for cigarettes in T.L.O.'s "purse[, which] was the obvious place in which to find them." *Id.* at 346.

The search for cigarettes in T.L.O.'s purse led to the finding of rolling papers, which, T.L.O. conceded, "indicated the presence of marihuana" in the purse. *Id.* at 347. Reasonable suspicion of marijuana in the purse, in turn, justified the slightly more invasive search through the rest of the purse. Those searches yielded other drug-related paraphernalia, including a pipe, plastic bags for storing marihuana, and index cards containing information about T.L.O.'s drug-purchasing customers. *Id.* Having discovered documents in T.L.O.'s possession that established her drug

distribution, the school official reasonably extended the scope of the search to read two letters found next to the index cards, which also implicated T.L.O. in drug dealing. *Id.*

In *T.L.O.*, the school official followed a logical progression of searches, each based upon suspicion—borne out by objects found during the earlier searches—that the official would find evidence in the places he searched. Standing diametrically opposed to *T.L.O.* is the strip search of Savana, where the initial report of present wrongdoing was vague, where other facts actually pointed toward Savana's innocence, and where the initial search (of Savana's backpack) provided no further suspicion that a more invasive search would turn up incriminating evidence. *See generally* Pet. App. 29a ("[N]o information pointed to the conclusion that the pills were hidden under her panties or bra . . . .").

The strip search of Savana was unreasonable in its scope. Without suspicion that Savana possessed ibuprofen in her panties and bra at the time of the search, it was unreasonable for Petitioners to have ordered Savana to disrobe and expose her genital area and breasts to school officials.

III. THE COURT OF APPEALS PROPERLY DENIED QUALIFIED IMMUNITY BECAUSE BINDING PRECEDENT AND COMMON SENSE DICTATE THAT IT IS PATENTLY UNREASONABLE TO STRIP SEARCH A THIRTEEN-YEAR-OLD GIRL BASED ON AN UNCORROBORATED ACCUSATION THAT THE GIRL PREVIOUSLY POSSESSED IBUPROFEN IN SOME UNKNOWN LOCATION.

The strip search of Savana, on the record before this Court, was not only unreasonable, but clearly unreasonable. At the time of the search, Ninth Circuit case law, the seminal Arizona state-court opinion interpreting *T.L.O.*, and common sense should have put Wilson on notice that his order to force Savana to disrobe and expose her genital area and breasts was unconstitutional. Any school official should have known not to strip search a child unless, at the very least, there is suspicion that the child currently possesses the sought-after object beneath her undergarments. Accordingly, the court below properly denied qualified immunity to the Petitioner who ordered this traumatizing search.[9]

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[9] As *amicus curiae* United States correctly points out, if this Court affirms the holding that the strip search violated Savana's rights, it should remand this case regardless of its holding on the qualified-immunity defense. Br. of *Amicus Curiae* United States 29 n.6. Respondent pled a claim under *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978), against Petitioner Safford Unified School District, who cannot benefit from qualified immunity. The lower courts have not addressed Respondent's *Monell* claim.

1. Qualified immunity is not available to a school official who orders a search that was clearly unreasonable at the time of the search. *See, e.g.*, *Wilson v. Layne*, 526 U.S. 603, 614 (1999). Officials are denied qualified immunity, even when there is not a case directly on point, if it should have been apparent to a reasonable person in the official's position that the challenged action was unlawful. *Hope v. Pelzer*, 536 U.S. 730, 739, 744-45 (2002); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Binding case law put Wilson on notice at the time of the search that Savana's compelled disrobing was unreasonable. Ninth Circuit precedent had long established that a school official could not strip search a child based on a vague and uncorroborated tip of drug possession. In *Bilbrey*, cited with approval in *T.L.O.*, 469 U.S. at 332 n.2, 342 n.6, a school principal strip searched two fifth-grade students after a school employee reported to the principal that she had just observed the students engage in the exchange of money for objects that she believed to be drugs. 738 F.2d at 1464. Neither search yielded drugs or evidence of drug use, and the students sued for a violation of the Fourth Amendment. *Id.*

A jury found that the searches were unreasonable under both reasonable-suspicion and probable-cause standards, but granted qualified immunity to the officials. *Id.* at 1464-65. The plaintiffs appealed, and the Ninth Circuit reversed the qualified-immunity portion of the judgment, holding that school officials are not entitled to qualified immunity for a strip search of a child when

they act on an uncorroborated, vague tip that a student may possess a drug somewhere in his belongings or on his person. *Id.* at 1467-69. While *Bilbrey* signaled that the school officials could have conducted a mine-run search of the plaintiff-students, the opinion was clear that school officials could not have conducted such a consequential, intrusive search based on the suspicion of wrongdoing they possessed. *Id.* at 1468.

Bilbrey set the standard for strip searches within the Ninth Circuit, and its holding should have put Wilson on notice that his strip-search order was unlawful. There are, to be sure, minor differences between the two cases, but none that works to Petitioners' advantage. For example, the tip in *Bilbrey* came from a trusted school official, not a juvenile, like Marissa, who already was in trouble and who already had lied to her school official. Moreover, the tip in *Bilbrey*, unlike Marissa's accusation, alleged *current* drug possession. The take-home point of *Bilbrey* applies with equal force here: a school official violates the Fourth Amendment when he strip searches a child based on an unsubstantiated accusation that the child possessed a drug somewhere in her belongings or on her person.

Petitioners and their *amici* do not acknowledge *Bilbrey*. Nor do they recognize the seminal Arizona state-court opinion interpreting *T.L.O.*, which, consistent with *Bilbrey*, holds that a school search for drugs is unreasonable where the school official searches a child in a location without sufficient suspicion that the location would contain

the object. *Appeal in Pima County Juvenile Action No. 80484-1*, 733 P.2d 316, 317 (Ariz. Ct. App. 1987) (holding that a principal's search of a student's pockets was unreasonable because the principal "had received no specific reports which would give rise to a reasonable suspicion that the minor's pockets would contain cocaine"). Rather, Petitioners and their *amici* note that (1) some of the lower-court judges who have considered the merits of this case believed that the search did not violate Savana's Fourth Amendment rights; and (2) *T.L.O.* provided a flexible, fact-based standard, and many lower courts have held that school officials should receive qualified immunity when confronted with the facts presented in those particular cases. Neither contention is dispositive here, where binding circuit precedent foreclosed any claim of reasonableness and, in any event, where the challenged strip search, on the record before this Court, was clearly unreasonable.

As for the observation that other judges reviewing this case have reached a different conclusion, neither Petitioners nor their *amici* argue that this is conclusive to the qualified-immunity inquiry, and for good reason. *See, e.g.*, *Groh v. Ramirez*, 540 U.S. 551 (2004) (denying qualified immunity to government official where dissenting justices would have held that the challenged conduct was lawful). The judges below who disagreed with eight of the eleven judges of the en banc court on the merits of Savana's constitutional claim incorrectly assumed that a school official can lawfully order a strip search based on a vague accusation of past drug

possession, notwithstanding *Bilbrey*, *T.L.O.*, and a long line of Fourth Amendment jurisprudence stating that an official must reasonably believe that the place he searches is where the sought-after object is stored. *See, e.g.*, Pet. App. 79a (contending that Wilson need not have had reasonable suspicion that pills would be found in Savana's panties in order to compel the observation of her genital area, and instead surmising that the search of her panties would have been unreasonable only if Wilson had affirmative evidence that pills were *not* in Savana's panties), *id.* at 149a-52a (assessing the lawfulness of the scope of the search without considering whether Wilson suspected that Savana was concealing pills beneath her undergarments). Under this logic, Wilson lawfully could have ordered a body-cavity search, too, since there was no affirmative evidence that Savana was not storing the pills inside her vagina or anus. This is not the law, and was not the law at the time that Savana was strip searched. School officials must heed common sense and binding precedent, and both put Wilson on notice that the strip search he ordered was unreasonable.

Petitioners' argument that other courts have had difficulty applying the *T.L.O.* framework to a different set of facts is no more availing. Their argument is akin to maintaining that police officers who use clearly excessive force to subdue a suspect are nonetheless entitled to qualified immunity because what constitutes excessive force on a different set of facts may be less clear. This is the exact opposite of how qualified immunity works, since a court must assess the clear illegality of an

action in light of the specific facts before it. *See, e.g.*, *Hope*, 536 U.S. 730 (denying qualified immunity to prison officials for Eighth Amendment claim).

Other cases may present close calls about whether a student strip search was reasonable. But that possibility does not justify blanket immunity to school officials for all student strip searches and, in any event, this is not one of those cases. Here, Petitioners executed an extraordinarily serious, degrading, and traumatizing search based on nothing more than an unsubstantiated accusation that Savana had at some time in the past possessed ibuprofen in an undisclosed location—perhaps in the medicine cabinet in her bathroom, in her desk drawer in her house, in her purse, in her backpack, in her locker, or somewhere on her person. To jump to the conclusion that Savana was both presently possessing ibuprofen and concealing it against her genitalia and breasts was, at best, pure speculation. *Cf. Renfrow*, 631 F.2d at 93 (holding that a strip search of a thirteen-year-old girl based on an uncorroborated drug-dog alert on the student—indicating that the student possessed a drug currently or at some point in the past—"exceeded the bounds of reason by two and a half country miles") (internal citation omitted). Case law and common sense dictate that school officials cannot execute a life-altering search of a thirteen-year-old girl's body based on only a hunch that the girl presently possesses ibuprofen and a mere guess that the ibuprofen is being stored against her genitalia.

While *Bilbrey* forecloses any claim that the strip search of Savana was reasonable, the

unreasonableness of this traumatizing search is self-evident even without *Bilbrey*. Case law and common sense should have put Wilson on notice that, with the information he possessed at the time, ordering thirteen-year-old Savana to bare her genital area and breasts to her school officials was clearly unreasonable.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals, sitting en banc, should be affirmed.

Respectfully submitted,

Adam B. Wolf
Counsel of Record
Graham A. Boyd
M. Allen Hopper
American Civil Liberties
Union Foundation
1101 Pacific Ave., Ste. 333
Santa Cruz, CA 95060
(831) 471-9000

Steven R. Shapiro
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

Bruce G. Macdonald
McNamara, Goldsmith,
Jackson & Macdonald, P.C.
1670 E. River Rd., Ste. 200
Tucson, AZ 85718
(520) 624-0126

Andrew J. Petersen
Humphrey & Petersen, P.C.
3861 E. Third St.
Tucson, AZ 85716
(520) 795-1900

Daniel Joseph Pochoda
ACLU of Arizona
P.O. Box 17148
Phoenix, AZ 85011
(602) 773-6003

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